

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of BERGER, Minors.

UNPUBLISHED
February 20, 2014

No. 317511
Kent Circuit Court
Family Division
LC Nos. 11-053724-NA;
11-053725-NA;
11-053726-NA

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Respondent-mother appeals as of right the order terminating her parental rights to her three minor children under MCL 712A.19b(3)(c)(i) and (g). We affirm.

“This Court reviews for clear error the trial court’s ruling that a statutory ground for termination has been established and its ruling that termination is in the children’s best interests.” *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). “A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.” *Id.*

MCL 712A.19b(3)(g) allows for termination of parental rights where a parent, without regard to intent, fails to provide proper care or custody and there is no reasonable expectation that the parent will be able to do so within a reasonable time considering the ages of the children. In this case, respondent testified that she placed the three minor children with their biological father in approximately October of 2010, because she could not provide proper care and housing for the children. The children remained with their father, but for a possible short stint with respondent, until they were removed from his care and placed in foster care in November of 2011. The children never returned home. At the time of removal, the father reported that respondent had rarely visited the children since they came into his care one year earlier. During this lengthy proceeding, respondent declined offers to have more frequent parenting time with the children, and she was inconsistent in her attendance at her scheduled parenting times. The record supports that respondent did not provide proper care and custody for approximately 2-1/2 years preceding the June 2013 termination.

Moreover, respondent failed to comply with many of her service referrals, including her failure to comply with random drug and alcohol screens or to provide the requisite verification of her attendance at Alcoholics Anonymous, and she did not demonstrate an ability to properly

parent the children during the parenting times she attended. “[A] parent must benefit from services offered so that he or she can improve parenting skills to the point where the children will no longer be at risk in the parent’s custody.” *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005), superseded in part on other grounds by statute as stated in *In re Hansen*, 285 Mich App 158, 163; 774 NW2d 698 (2009), vacated on other grounds 486 Mich 1037 (2010). Here, the record supports that respondent did not adequately benefit from services. Additionally, the children had been in foster care for approximately 18 months by the time of termination. The children needed permanence and respondent had not adequately benefitted from services to the point that she was able to provide proper care and custody or would be able to do so within a reasonable time considering the children’s ages. *Id.*; *In re CR*, 250 Mich App 185, 196; 646 NW2d 506 (2002) (where the “children had been in foster care for more than a year” and there was “no real evidence that” respondent benefitted from services, “there was sufficient evidence that [the respondent] had failed to provide proper care and custody for her children in the past and would be unlikely to be able to provide that proper care and custody within a reasonable amount of time given the children’s ages”).

Thus, on the record before us, the trial court’s finding that respondent was unable to provide proper care and custody to the children and was not likely to be able to do so within a reasonable time, MCL 712A.19b(3)(g), does not leave us with “a definite and firm conviction that a mistake has been made.” *In re Hudson*, 294 Mich App at 264. Having concluded that the trial court did not clearly err by finding a statutory ground for termination under MCL 712A.19b(3)(g), we do not need to address the trial court’s additional ground for termination. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). Nevertheless, we also find that the record supported the trial court’s finding that MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist) constituted an additional ground for termination.

Furthermore, we find that the trial court did not clearly err when determining that termination of respondent’s parental rights was in the children’s best interests. The children’s caseworker testified that termination was in the children’s best interests given respondent’s failure to comply with some service referrals or adequately rectify her barriers to reunification, including her substance abuse and parenting skills. The record established that the children, all of whom suffered from reactive attachment disorder, needed permanency and consistency, as well as an attentive caregiver who was attuned to their needs. Respondent’s failure to comply with services or consistently visit the children, coupled with the fact that she had not provided for their care in a considerable period of time, supported the trial court’s conclusion that she was unable to offer the children the care and permanency they required. Accordingly, the trial court’s best interest determination does not leave us “with a definite and firm conviction that a mistake has been made.” *In re Hudson*, 294 Mich App at 264. See *In re Trejo Minors*, 462 Mich 341, 364; 612 NW2d 407 (2000) (“[W]e cannot conclude that the court’s assessment of the children’s best interests was clearly erroneous. . . . The court did not clearly err by refusing to further delay permanency for the children, given the uncertain potential for success and extended duration of respondent’s reunification plan.”).

Respondent also argues on appeal that petitioner failed to make reasonable reunification efforts. “Generally, when a child is removed from the parents’ custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child[ren]’s removal by adopting a service plan.” *In re HRC*, 286 Mich App at 462. This Court reviews the trial court’s

findings of fact, including whether petitioner made reasonable efforts to reunify the family, for clear error. *In re Rood*, 483 Mich 73, 90; 763 NW2d 587 (2009). The trial court did not clearly err by finding that petitioner had made reasonable efforts to reunify respondent with the minor children. *Id.*; *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005).

Here, the record establishes that respondent received ample reunification services, including a psychological assessment, counseling, drug screens, substance abuse treatment, parenting classes, supervised parenting time, and case management. The foregoing services supported the trial court's finding that respondent received reasonable reunification efforts. See *In re Fried*, 266 Mich App at 542-543. Moreover, although a petitioner generally "has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). Here, the record supported that although petitioner provided respondent with ample services, respondent failed to substantially comply with many of those services and, thus, failed to satisfy her "commensurate responsibility . . . to participate in the services that are offered." *Id.* Therefore, the trial court did not clearly err by finding that petitioner made reasonable efforts at reunification. *Id.*; *In re Fried*, 266 Mich App at 542-543.

Finally, respondent argues on appeal that she was denied her due process right to a fundamentally fair proceeding. "[B]ecause respondent failed to raise this issue before the trial court, it has not been properly preserved for appellate review." *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Whether proceedings complied with a party's right to due process generally "presents a question of constitutional law that we review de novo." *In re Rood*, 483 Mich at 91. Nevertheless, "[w]e review unpreserved claims of constitutional error under a plain-error analysis." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under the plain error rule, respondent must show that the trial court committed a plain error and that the error affected her substantial rights, i.e., "that the error affected the outcome of lower court proceedings." *Carines*, 460 Mich at 763.

"A natural parent has a fundamental liberty interest in the care, custody, and management of his child that is protected by the Fourteenth Amendment of the United States Constitution." *In re Rood*, 483 Mich 91 (quotation omitted); see also *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993) ("[P]arents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process.").

The essence of due process is fundamental fairness. There are two types of due process: procedural and substantive. The fundamental requirements of procedural due process are notice and a meaningful opportunity to be heard before an impartial decision maker. [T]he essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests. A person claiming a deprivation of substantive due process must show that the action was so arbitrary (in the constitutional sense) as to shock the conscience. [*In re Beck*, 287 Mich App 400, 401-402; 788 NW2d 697 (2010) (citations and quotations omitted).]

Here, respondent does not argue that her right to procedural due process was violated, i.e., respondent does not claim, nor does the record support, that she did not have “notice and a meaningful opportunity to be heard before an impartial decision maker.” *Id.* Rather, respondent raises multiple violations of her right to substantive due process, including the breakdown in her relationship with the children’s caseworker, the caseworker’s performance, the trial court’s failure to grant a dual order, and the children’s placement in multiple foster homes during the case. However, respondent does not provide any authority supporting the specific due process violations she alleges. Our review of the record reveals no violation of respondent’s due process right to a fair proceeding. Respondent has not demonstrated plain error that affected the outcome of the proceedings. *Carines*, 460 Mich at 763-764; *In re VanDalen*, 293 Mich App at 135.

Affirmed.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering